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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

KARIN J. MORTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), the Court held "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." In this case, the Kansas Supreme Court held that a suspect's confession was rendered involuntary for due process purposes because a government agent made a single misleading but non-coercive statement to the suspect, even though the court explicitly found that (1) there was no *Miranda* violation, (2) the agent made no false statements about the evidence against the suspect nor about the applicable law, and (3) "there was nothing coercive about the manner and duration of the interview."

This case thus presents the following question:

Whether police deception, standing alone, can render an otherwise voluntary confession "involuntary" for due process purposes?

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully requests that this Court grant the petition for a writ of certiorari and summarily reverse the judgment of the Kansas Supreme Court. In the alternative, the Attorney General requests that the Court grant the petition and set the case for full briefing and oral argument.

OPINIONS BELOW

The July 3, 2008, opinion of the Kansas Supreme Court (Pet. App. 1a–44a) is reported at 186 P.3d 785 (Kan. 2008). The Kansas Court of Appeals opinion (Pet App. 45a–51a) is unpublished. No. 97,848, 2007 WL 2080540 (Kan. Ct. App. July 20, 2007).

JURISDICTION

The Kansas Supreme Court rendered its decision on July 3, 2008. This petition has been filed within 90 days of that date, as required by Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

STATEMENT

1. Respondent Karin Morton worked for the Ottawa Recreation Commission (ORC), a taxpayer-funded, local government entity that provides recreation services for the city of Ottawa, Kansas. Appendix to Petition for a Writ of Certiorari (hereafter "Pet. App.") 5a. As part of her duties,

Respondent was authorized to purchase surplus federal government property. *Id.*

On behalf of the ORC, Respondent purchased several federal surplus trailers, which under federal rules and regulations had to be used for public purposes. Pet. App. 5a. When the local director of the federal surplus property program, Paul Schwartz, noticed one of the trailers located at Respondent's residence, he became suspicious and sent a form to the ORC requesting verification that all federal surplus trailers were being used for public purposes. *Id.* at 5a–6a. Respondent completed and signed the form, attesting that all of the former federal trailers were located at ballparks in Ottawa where they were being used for concession stands and quarters for recreational staff and officials. *Id.* at 6a.

Schwartz then made his concerns known to the General Services Administration (GSA) and local police. Pet. App. 6a. An Ottawa police officer interviewed Respondent, with her attorney present. The officer gave Respondent *Miranda* warnings and the interview was recorded. Ottawa police then provided a report to GSA, which began its own investigation. *Id.*

The GSA investigator was Special Agent John Pontius. Pet. App. 6a. Pontius contacted Respondent to see if she would meet with him. She agreed, and Pontius met with her at the Ottawa police station. *Id.* He did not give her *Miranda* warnings, but he did inform her that she was not under arrest, that she did not have to answer questions, and that she could leave at any time. Respondent was not handcuffed or

restrained in any way during the interview. *Id.* at 8a.

In the interview, Respondent acknowledged that she had received the compliance form from Schwartz, that she had filled out the form, and that the handwriting and signature on the form were hers. Pet. App. 6a. She also told Pontius that she had parked a surplus trailer at her residence and that she had purchased the trailer as a gift for her husband. *Id.* at 47a. Respondent testified that it was not until near the end of the interview that she realized there was an ongoing criminal investigation into this matter. *Id.* at 9a.

2. Respondent was charged with one count of making a false information in violation of Kan. Stat. Ann. § 21-3711, a felony. Pet. App. 7a. She moved to suppress the statements she made to Special Agent Pontius, and the district court held a suppression hearing. *Id.* In that hearing, Respondent testified that when Pontius first called her, she asked him whether her attorney should be present for the interview. According to Respondent, Pontius told her it would be an "informal" interview and that "no, it's not that kind of interview. Some people bring their attorneys but it's nothing you'll need an attorney for." *Id.* at 7a–8a. Respondent further testified that she did not realize that Pontius was conducting a criminal investigation, or that there was an ongoing criminal investigation of any kind. *Id.* at 9a. According to Respondent, had she known those facts, she would never have agreed to speak to Pontius without her attorney. *Id.*

Pontius testified that he first contacted the attorney who had previously represented Respondent before contacting Respondent, but that the attorney's firm indicated that the firm was not sure it would continue representing Respondent. Pet. App. 9a. Only then did Pontius contact Respondent directly, and she agreed to meet with him at the Ottawa police station. *Id.* at 10a.

Pontius denied telling Respondent she did not need an attorney, and he testified that he made her aware that he was a criminal investigator for GSA. Pet. App. 10a. Pontius further testified, consistently with Respondent's testimony, that he told her that she was not under arrest, that she was not being detained, that the interview was not mandatory, that she could stop talking at any time, and that she was free to leave any time she wanted. Pontius testified that he did not give Respondent *Miranda* warnings because she was not in custody. *Id.*

The district court granted Respondent's motion to suppress. Pet. App. 10a. As the Kansas Supreme Court described it, the "basis for the trial court's decision is difficult to discern, but the ruling appears to have been based on two grounds: the agent's failure to provide *Miranda* warnings and the [trial] court's conclusion that the agent's conduct was unfair, rendering Morton's statements involuntary." *Id.* at 10a–11a.

3. The Kansas Court of Appeals reversed the trial court. First, the court of appeals emphasized that *Miranda* warnings are only required if police engage in a custodial interrogation. Pet. App. 48a. The

court of appeals briefly discussed the trial court's "abbreviated factual findings" that Respondent may have been misled about the nature of the interview and the existence of an ongoing criminal investigation, concluding that there "is evidence to support such findings." *Id.* at 49a. Nonetheless, after reviewing two Kansas cases addressing when an interrogation is "custodial," the court of appeals easily concluded that "[u]nder the circumstances presented here, Morton was not in custody, and thus Pontius was not required to read her the *Miranda* rights. The trial court erred in suppressing the statements." Pet. App. 51a.

4. The Kansas Supreme Court reversed the Court of Appeals. The supreme court recognized that the trial court's basis for suppressing Respondent's statements "is difficult to discern," Pet. App. 10a, but analyzed two legal questions: First, did Pontius violate the *Miranda* rule? Second, did Pontius's statement that Respondent did not need an attorney because "it's not that kind of interview" render Respondent's statements involuntary under the Due Process Clause of the Fourteenth Amendment? *Id.* at 10a–11a.

On the *Miranda* question, the supreme court observed that the trial court never made an explicit finding of fact on the disputed matter whether Pontius told Respondent that she did not need a lawyer. Pet. App. 15a. Nonetheless, because the trial court's conclusion that the interview was unfair seemed to imply a finding in Respondent's favor on that point, the supreme court accepted

"[Respondent's] version of events as true." *Id.* [And, for purposes of this petition for a writ of certiorari, Kansas does not challenge that factual assumption.] Considering the totality of the circumstances, the supreme court concluded that a reasonable person would not have believed herself to be in custody, so the interrogation was not custodial, *Miranda* did not apply, and there could be no *Miranda* violation. *Id.* at 16a–27a.

The supreme court then proceeded to the question at issue in this petition: whether a statement by Pontius that Respondent did not need an attorney because "it's not that kind of interview" rendered Respondent's subsequent incriminating statements involuntary and therefore inadmissible under due process principles? Pet. App. 27a. The supreme court observed that this Court has recognized that even a non-custodial interrogation can conceivably result in an involuntary confession, citing *Beckwith v. United States*, 425 U.S. 341, 347–48 (1976). *Id.* at 27a–28a. And the Kansas court opined that the trial court here appeared to have "determined that the agent's conduct was fundamentally unfair and, thus, [Respondent's] statements were not voluntary." *Id.* at 29a.

Citing a Kansas case, *State v. Walker*, 153 P.3d 1257, 1266 (Kan. 2007), the supreme court stated that the following six factors are considered in determining whether a statement was voluntary for due process purposes: (1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to

communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language. Pet. App. 29a. The court then narrowed the inquiry with the following analysis:

> In this case, there is no claim that [Respondent] had a mental condition that impacted the voluntariness of her statements. [Respondent] has not claimed the manner or duration of the interview made her statements involuntary. Specifically, there is no evidence the agent was hostile, threatening, or abusive. Further, [Respondent] has not claimed the length of the interview was so long that her will was overborne. She has not claimed she was deprived of the ability to communicate with the outside world during the interview. And there is no claim that her age, level of education, or background are relevant to the admissibility of her statements. In fact, the evidence showed that [Respondent] was 40 years old and has a degree in public administration. *Instead, only the fifth factor—the fairness of the officers—is at issue in this case.*

Id. at 29a–30a (emphasis added).

Focusing on the fairness of Pontius's conduct, the supreme court acknowledged that "[i]n the present case, [Pontius's] conduct did not involve false statements about the evidence against [Respondent] or misrepresentations of the law." Pet. App. 33a. Indeed, the court recognized that Respondent "had no *right* to have an attorney present in a noncustodial

interview." *Id.* (emphasis original). Nonetheless, the supreme court opined that it was constitutionally significant that Pontius "did not tell [Respondent] she had no *right* to have an attorney present, he told her she did not *need* an attorney." *Id.* at 34a (emphasis original). Opining that Respondent asked the question because she was trying to determine whether the interview was part of a criminal investigation, the supreme court concluded that Pontius's "response to [Respondent's] question was an affirmative misrepresentation about the true nature of the interview." *Id.*

The Kansas Supreme Court then opined that the "question then is whether the agent's conduct rendered [Respondent's] statements involuntary." The court declared that the "essential inquiry is whether the statements were the product of [Respondent's] free and independent will." Pet. App. 34a. The court evaluated that question in one paragraph, acknowledging that "[a]ll other aspects of the circumstances surrounding the interview indicate that [Respondent's] statements were voluntarily made," that Respondent was "a 40-year-old, college-educated woman who had been involved in a criminal investigation in this very matter, that there "was *nothing coercive about the manner and duration of the interview*," and that Pontius made clear to Respondent that "she did not have to answer any questions, she could stop the interview at any time, and she was free to leave at any time." *Id.* at 34a–35a (emphasis added).

The supreme court found, however, that had Respondent known Pontius was conducting a criminal investigation, "she would not have agreed to the interview without the advice and presence of counsel." Pet. App. 35a. Opining that [Respondent] "believed that the criminal investigation had ended, and [Pontius's] status as a criminal investigator was not patently apparent," *id.*, the court concluded that, "[u]nder these circumstances, by reason of the agent's conduct, [Respondent's] participation in the interview and the statements given therein were not the product of her free and independent will. Accordingly, [Respondent's] statements were involuntary and, thus, inadmissible." *Id.*

Two justices dissented. The Chief Justice did not disagree that Pontius's statement that Respondent did not need an attorney was misleading. Pet. App. 35a. But, she argued, no other facts here supported a conclusion that Respondent's statements were involuntary. *Id.* at 36a–37a. Indeed, the Chief Justice pointed out that "[t]he majority does not cite, nor is there any case in which we have found deceptive interrogation tactics, standing alone, were sufficient to render an otherwise voluntary confession involuntary." *Id.* at 37a. A second justice also wrote a dissenting opinion, making similar arguments. *Id.* at 38a–44a.

REASONS FOR GRANTING THE WRIT

I. The Kansas Supreme Court's Decision Conflicts With *Colorado v. Connelly*, 479 U.S. 157 (1986), On An Important And Recurring Constitutional Question

The fundamental flaw in the Kansas Supreme Court's decision is that court's complete failure to acknowledge that police coercion is a *constitutional prerequisite* to a finding that a confession is *involuntary* under the Due Process Clause. In evaluating whether police coercion has occurred, the courts apply a totality of the circumstances test. But the presence or absence of police coercion is not simply one factor to consider, it is the end determination of the inquiry. For over twenty years, this Court's decisions have been clear on these points, although some commentators and lower courts have expressed disagreement or argued for a different analysis.

In *Colorado v. Connelly*, 479 U.S. 157 (1986), a psychotic man approached police and declared that he had committed a murder and wanted to talk about it. After the man twice was advised of his *Miranda* rights, he told his story, offering many details about a murder. Ultimately, the state courts suppressed his confession on the ground that the man's psychosis precluded him from making free and rational choices. In the Colorado Supreme Court's opinion, such circumstances rendered the suspect's confession involuntary, even though the police did nothing coercive. *Id.* at 162–63.

This Court reversed. Specifically, the Court declared that "[w]e hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." 479 U.S. at 167.

Connelly sets a clear constitutional baseline for determining whether a confession is involuntary for due process purposes – there must be "coercive police activity," at a minimum. The presence or absence of coercive police activity is not simply *one factor* among many that courts are to consider. True, courts may consider a variety of factors in determining whether police coercion occurred, but *police coercion* is the ultimate inquiry, not just a factor in a "voluntariness" analysis.

Indeed, the Court has made clear that its confession cases use the terms "coerced confession" and "involuntary confession" interchangeably as "convenient shorthand." *Arizona v. Fulminante*, 499 U.S. 279, 288 n.3 (1991). In other words, courts are not at liberty to deem a confession "involuntary" in violation of due process principles unless and until there is a finding of *police coercion*. *Connelly* thus states the constitutional touchstone for confessions that violate the Fourteenth Amendment: there must be *police coercion* which causes the confession, and it is that coercion and causation which ultimately renders the confession *involuntary* for due process purposes.

The Kansas Supreme Court here erred—in the most fundamental fashion—by treating police

coercion as just one factor to consider in determining the "voluntariness" of Respondent's confession. As a result of that error, the Kansas court was able to conclude that Respondent's confession here was "involuntary" while at the same time concluding that "*[t]here was nothing coercive about the manner and duration of the interview* . . . ." Pet. App. 34a (emphasis added). These two positions, however, are incongruous and constitutionally illogical.

In finding that Respondent's confession was involuntary, the Kansas Supreme Court relied solely on Agent Pontius's statement to Respondent that she did not need an attorney because "it's not that kind of interview." But the weight of legal authority correctly holds that such actions do not render a confession involuntary for due process purposes. Indeed, the general rule is that "deception or fraud practiced upon the defendant in obtaining a confession does not constitute a violation of the principles of due process as long as it does not under the facts of the case amount to mental coercion." Annot., *Admissibility of confession as affected by its inducement through artifice, deception, trickery or fraud*, 99 A.L.R. 2d 772, § 4 (1965 & Cum. Supp.) (citing cases). In the context of deceptive police interrogation tactics, some older cases found confessions to be *unreliable* and therefore inadmissible because they were untrustworthy, *id.*, but that is different than finding, as the Kansas Supreme Court did here, that a misleading police statement rendered a confession *involuntary*.

Importantly, over twenty years ago, this Court rejected the *unreliability* rationale for finding that confessions were obtained in violation of due process principles. Again, in *Connelly*, the Court rejected consideration of any ultimate inquiry other than *police coercion*, declaring as follows: "A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, and not by the Due Process Clause of the Fourteenth Amendment." 479 U.S. at 167.

In any event, no one here has questioned the *reliability* of the statements Respondent made to agent Pontius, nor did the Kansas Supreme Court mention or discuss reliability. Instead, that court only addressed voluntariness. As *Connelly* makes clear, even if the facts here supported a conclusion of unreliability—which they do not—such a determination would not provide a legitimate basis for finding a due process violation.

So long as *Connelly* remains good law, and there is no case from this Court suggesting that it is not, coercive police conduct is a constitutional prerequisite to finding that any confession was involuntarily obtained in violation of the Due Process Clause. Even commentators somewhat critical or questioning of the holding of *Connelly* recognize that *Connelly* is the controlling case on whether a confession was obtained in violation of due process principles. *See, e.g.*, 2 Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, *Criminal Procedure* § 6.2(b) (1999) (citing some articles critical of a strict focus on

police coercion, but recognizing that *Connelly* is the key case).

Though a few lower courts appear to have suppressed a confession on due process grounds when police misled a suspect about whether a confession or other evidence could be used against him, *see id.* § 6.2(c), p. 458, discussed below in Part II., no decision of this Court since *Connelly* has reached such a conclusion, nor suggested that police deception alone could render a confession involuntary in violation of due process principles. Thus, in light of *Connelly* and the Court's subsequent, unwavering adherence to the fundamental principles *Connelly* recognized, the Kansas Supreme Court's decision here is wrong as a matter of law. Indeed, unless this Court is to revisit the *Connelly* coercion principle, the question is not even debatable.

Kansas is mindful that this Court is not a general court of "error correction," but this case may warrant summary reversal for several reasons. First, the constitutional principle at stake is important and fundamental, one that arises regularly, indeed daily, as police question suspects in a variety of settings. Second, the Kansas Supreme Court's decision undermines the *Connelly* principle not only by incorrectly holding that coercion is not required to find that a confession is involuntary, but also by in effect declaring that any misleading statement by a police officer may trump all other considerations in determining the voluntariness of a confession. *See* Pet. App. 42a (Davis, J., dissenting) (the majority erroneously concludes that Respondent's statements

"were rendered involuntary *solely* on the basis of the agent's previous statement that the interview was not the sort where she would need an attorney.") (emphasis original). Lastly, the Kansas Supreme Court's decision rests entirely on principles of federal constitutional law. At this stage, there are no disputed facts, nor is state law in any way implicated. Rather, this case fits squarely within the type of cases involving pure questions of federal law in which the Court traditionally has exercised its prerogative to grant certiorari and summarily reverse. *See, e.g.*, Eugene Gressman, et al., *Supreme Court Practice* § 5.12(c) (9th ed. 2007).

II. The Decision Below Is Part Of A Conflict Of Authority On An Important And Recurring Constitutional Question

Hundreds of lower federal and state court decisions have followed, and continue to follow, the *Connelly* principle. *See, e.g.*, *Jackson v. McKee*, 525 F.3d 430, 433 (6th Cir. 2008) (citing *Connelly* and declaring that, "[a]ccordingly, when a criminal defendant can show that 'coercive police activity' caused him to make an involuntary confession, due process prohibits the government from relying on the statement."); *United States v. Fernandez*, No. 07-51100, 2008 WL 2704547 (5th Cir. July 10, 2008) ("The focus of our voluntariness inquiry must be on the Detectives' actions; indeed, 'coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment.' *Colorado v. Connelly*, 479 U.S. 157,

167 (1986). Moreover, that coercive conduct must cause the confession. *Id.* at 164.").

Indeed, even the Kansas Supreme Court, in recent cases involving (1) a threat made in obtaining a confession and (2) a suspect with low intellect, has cited and recognized the *Connelly* coercion principle. *See, e.g.*, *State v. Brown*, 182 P.3d 1205, 1212 (Kan. 2008) (the "issue for us to consider is whether governmental coercion rendered the confession involuntary" when state officials suggested the suspect might lose custody of his children if he did not cooperate); *State v. Johnson*, No. 96,681, 2008 WL 2938478, at *9–10 (Kan. Aug. 1, 2008) (citing *Connelly* and recognizing that the question is whether police coerced a suspect's confession; a suspect's low intellect alone cannot render a confession involuntary).

Unfortunately, the Kansas Supreme Court—and some other lower state courts—appear to draw a distinction between the constitutional significance of police threats and a suspect's low mental capacity on the one hand, and police deception on the other. In the latter category, the Kansas Supreme Court and some other state courts apparently decline to follow the *Connelly* principle and instead have found confessions to be involuntary on the basis of deception alone, with no apparent police coercion, particularly if the deception involved misstatements of law. *See* LaFave et al. *supra*, § 6.2(c) nn.122, 123 (citing several state cases decided after *Connelly*; most involved police either telling a suspect that he

would have immunity or that his statements could not/would not be used against him).

In contrast, many lower state courts and federal Circuits have declined to create an exception for police deception and instead adhere to the *Connelly* coercion principle in all circumstances. *Id.* (citing cases from Nebraska, Georgia, Hawaii, Massachusetts, Missouri, and the Ninth Circuit). For example, the Nebraska Supreme Court has made clear that "mere deception will not render a statement involuntary or unreliable." *State v. Walker*, 493 N.W.2d 329, 333 (Neb. 1992). It is simply impossible to reconcile such holdings with the Kansas Supreme Court's decision, which found Respondent's statements to be involuntary simply and solely because of a single, misleading response by the agent to a question, a response that even though misleading neither misstated the law nor overstated the evidence against Respondent.

If the concern of those courts suppressing confessions on the basis of police deception alone—with no showing of police coercion—is that such statements may be false or unreliable, *Connelly* again provides the answer: *Connelly* expressly holds that *reliability* is a matter for state and federal evidentiary rules, not the *voluntariness* principle of the Due Process Clause. 479 U.S. at 167. The reasons for such a distinction are quite apparent. Police deception, unlike police coercion, would not inherently nor necessarily undermine judicial confidence in the veracity of the statements a suspect might make. Nor is it possible to equate police

deception with police coercion. Much deceptive behavior would not be coercive in any way, just as in this case. Thus, there are excellent reasons why police coercion and police deception are different constitutionally. As a general rule, the mere fact of police deception does not render police conduct inherently coercive, nor does it render suspects' statements inherently unreliable.

Even if some lower courts are correct in holding that police misstatements of law—or overstating the evidence against a suspect—are in effect exceptions to the *Connelly* coercion requirement, the Kansas Supreme Court's decision in this case still would be wrong. The Kansas Supreme Court expressly found that Agent Pontius did neither of those things. *See* Pet. App. 33a ("In the present case, the agent's conduct did not involve false statements about the evidence against Morton or misrepresentations of the law.") For reasons not really explained in its opinion, the Kansas Supreme Court apparently did not like what it saw here, and so declared a federal constitutional violation, even though the controlling decisions of this Court do not support finding such a violation. Further, the Kansas decision goes against the vast majority of lower court decisions, directly conflicting with many such decisions that make clear that police deception, standing alone, does not render an otherwise voluntary statement "involuntary" for due process purposes.

* * * * * * *

Kansas believes the Court's decision in *Colorado v. Connelly* dictates the outcome in this case and demonstrates that summary reversal of the Kansas Supreme Court decision would be appropriate here. If the Court perceives that there remains uncertainty regarding the correctness or the scope of the *Connelly* coercion principle, then Kansas asks that the Court set the case for full briefing and oral argument on the question whether a misleading statement by a police officer to a suspect, standing alone and in the absence of any other evidence of coercion, can ever render a resulting confession involuntary in violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision below either summarily reversed, or the case set for briefing and argument.

Respectfully submitted,

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September 2008

[Filed July 3, 2008]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 97,848

STATE OF KANSAS,

Appellant,

v.

KARIN J. MORTON,

Appellee.

SYLLABUS BY THE COURT

1. When reviewing a district court's decision on a motion to suppress, an appellate court determines, without reweighing the evidence, whether the facts underlying the district court's decision were supported by substantial competent evidence. The district court's legal conclusions drawn from those facts are reviewed de novo.

2. A two-part inquiry is used to determine whether an interrogation is custodial for purposes of *Miranda*. The first prong is: what were the circumstances surrounding the interrogation? We review that determination under a substantial competent evidence standard. The second prong of the inquiry is: under the totality of those circumstances, would a reasonable person have felt he or she was not at

liberty to terminate the interrogation and leave? That determination is reviewed de novo.

3. The following factors are to be considered in analyzing the circumstances surrounding the interrogation: (1) when and where the interrogation occurred; (2) how long it lasted; (3) how many police officers were present; (4) what the officers did and the defendant said; (5) the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door; (6) whether the defendant is being questioned as a suspect or a witness; (7) how the defendant got to the place of questioning, that is, whether he or she came independently in response to a police request or was escorted by police officers; and (8) what happened after the interrogation—whether the defendant left freely, was detained, or was arrested. These factors are not to be applied mechanically or treated as if each factor bears equal weight. Each case is to be analyzed on its own facts; some factors will be present in one case and not in another, and the importance of each factor may vary from case to case.

4. The question of whether an interrogation is custodial must be determined based on an objective standard of how a reasonable person in the suspect's situation would perceive his or her circumstances. Courts must examine all of the circumstances surrounding the interrogation and determine how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.

5. The determination of "custody" for purposes of *Miranda* depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.

6. Unwarned inculpatory statements obtained through noncustodial interrogation, although not barred by *Miranda*, may nevertheless be inadmissible if they were obtained in violation of the due process voluntariness requirement.

7. In determining whether a defendant's confession is voluntary, the essential inquiry is whether the statement was the product of the free and independent will of the accused. In making this determination, the court considers the following specific factors: (1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to communicate with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency in the English language.

8. A law enforcement officer's false statements to a suspect about the evidence implicating the suspect do not, by themselves, render the suspect's confession involuntary. Rather, they must be viewed in conjunction with the totality of the circumstances surrounding the confession to determine whether it was voluntarily made.

9. Under the totality of the circumstances in this case, the General Services Administration agent's conduct that included telling the defendant that she

did not need an attorney for the interview, because it was not "that kind" of interview, rendered her statement involuntary and, thus, inadmissible.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 20, 2007. Appeal from Franklin District Court; JAMES J. SMITH, judge. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed. Opinion filed July 3, 2008.

Heather R. Jones, county attorney, argued the cause, and *Paul J. Morrison*, attorney general, was with her on the brief for the appellant.

Pantaleon Florez, Jr., of Topeka, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

ROSEN, J.: The district court suppressed statements Karin J. Morton made in an interview with a criminal investigator for the Government Services Administration (GSA), for failure to provide *Miranda* warnings and because of unfair conduct that rendered her statements involuntary. The State filed an interlocutory appeal. In an unpublished decision filed July 20, 2007, the Court of Appeals reversed the district court, holding that *Miranda* warnings were not required because the interview was not custodial. We granted Morton's petition for review. Although the Court of Appeals correctly determined that *Miranda* warnings were not required because the interview was not custodial, we hold that the agent's conduct rendered Morton's statements involuntary and thus inadmissible. Accordingly, we reverse the

Court of Appeals, and affirm the judgment of the district court.

FACTS

Factual background

Morton worked for the Ottawa Recreation Commission (ORC), a taxpayer-funded entity that provides recreation services for the community of Ottawa. As part of her job duties, Morton was authorized to purchase federal surplus government property for the ORC. Federal surplus property is not available to the general public and is subject to use restrictions, including that personal use of the property is prohibited for a set period of time.

In early 2004, Morton purchased several travel trailers through the federal program. Paul Schwartz, director of the federal surplus property program, spoke with Morton when she purchased the trailers and advised her of the restrictions. Morton told Schwartz the ORC intended to use the trailers to store equipment and for concessions. Schwartz, being an impassioned guardian entrusted with safeguarding the transfer and subsequent utilization of government-owned surplus property, began investigating ORC's use of the trailers after receiving a letter alleging that some of the surplus property was not being used in compliance with the program restrictions. Schwartz' intuition led him straight to Morton's residence, where he spotted one of the trailers.

Presumably noting that Morton's residence appeared to be a curious location for a publicly-operated concessions stand and/or storage facility,

Schwartz sent a compliance check form to the ORC, requesting information regarding the location and current use of the surplus property. Morton completed and signed the form, attesting that all of the trailers were located at the Ottawa ballfields and were being used for concessions stands and quarters for staff and officials.

His duty served, Schwartz then handed the matter over to the GSA and local law enforcement. Officer Weingartner of the Ottawa Police Department began investigating the matter. Officer Weingartner found one of the travel trailers at Morton's residence. Later, he interviewed Morton. Morton was represented by an attorney at the interview. The officer provided *Miranda* warnings and the interview was recorded.

After the Ottawa Police Department completed its report of the investigation, the GSA began its own investigation. The matter was assigned to Special Agent John Pontius, a criminal investigator with the GSA. Agent Pontius reviewed the police report and determined that additional facts were needed about the compliance form. Agent Pontius decided to do a follow-up interview to ask questions about the form.

Agent Pontius got in touch with Morton, and she agreed to meet him at the Ottawa Police Department. Agent Pontius did not provide Morton with *Miranda* warnings prior to questioning her. During the interview, Morton admitted receiving the compliance form, admitted that she filled out the form, and identified her handwriting and her signature on the form.

Agent Pontius sent a summary of his interview to the county attorney's office and to his headquarters. Subsequently, Morton was charged with one count of making a false information under K.S.A. 21-3711, a severity level 8 nonperson felony.

The suppression hearing

Prior to trial, Morton filed a motion to suppress her statements to Agent Pontius, contending that the failure to provide her with *Miranda* warnings required suppression. The State filed a response, contending that Morton was not in custody and, therefore, no *Miranda* warnings were required. The State also argued that Morton's statements were voluntarily made and, therefore, were admissible.

The trial court held a hearing on the suppression motion. Both Agent Pontius and Morton testified. Their respective versions of events differ somewhat.

Morton's testimony

Morton testified that several months after the Ottawa Police Department investigation was completed, her attorney left a message that a representative from the GSA had contacted his office and said a GSA agent wanted to talk to her about the trailer. She tried to call her attorney back, but he never returned her calls. After several weeks she used the GSA website to obtain Agent Pontius' phone number and left a message for him at his office.

Agent Pontius returned her call. He told her it was an informal interview and asked her if there was some alternative to the local police department where they could meet. She could not think of anyplace

private enough, so they agreed on the police department. Morton testified she asked Agent Pontius if this was something she would need her attorney for. Agent Pontius told her, "[n]o, no, it's not that kind of interview. Some people bring their attorneys but it's nothing you'll need an attorney for."

According to Morton, at the time she agreed to meet with the agent she believed the criminal investigation was over. She had read in the paper that the county attorney had declined to prosecute, and her attorney had told her it was over. Morton testified she anticipated there would be a meeting with the GSA because the GSA was the surplus property oversight agency, and it would be deciding whether it would recover the trailer.

Agent Pontius and another special agent met her at the police station at the agreed upon time. He introduced himself and the other agent as "special agents." Morton testified that in her mind, a "special agent" was someone who works for the government and was not synonymous with "criminal investigator." They went into a break room. Before the interview started, Agent Pontius told Morton she was not under arrest; she did not have to answer their questions; and she could leave at any time. She was not handcuffed or physically restrained in any way.

Toward the end of the interview, Agent Pontius asked her, "Are you aware that this has been returned to the county attorney's office?" She replied that she was not. He asked her, "No one from the county attorney's office has called you?" She said,

"No." He then said, "Well, it's back. It's back at her office." Morton testified that Agent Pontius told her that was part of the reason for the interview—to clarify some items on behalf of the county attorney because he was going to forward his report to the county attorney. After the interview, Agent Pontius told her he would have his report on the county attorney's desk in about 2 to 3 weeks.

Morton testified that she was not aware the interview was part of a criminal investigation until the end of the interview. Morton testified that she would have had counsel present at the interview if she had known the county attorney was considering criminal charges again. She said her attorney had advised her that if someone wanted to talk to her as part of the criminal investigation, she should agree, but arrange to have him present.

Agent Pontius' testimony

Agent Pontius testified that he wanted to interview Morton to clarify facts about the federal documents that the local police did not ask during their interview. He considered Morton a suspect, and he was conducting a criminal investigation.

Before he contacted Morton to set up an interview, the agent called the attorney who had represented her during her previous interview with the police. According to the agent, the attorney's office said they were not sure they were going to be representing her, so he called Morton at home and left a message. When she called him back, they discussed the interview.

The agent testified that Morton voluntarily met him at the Ottawa Police Department Building. Another agent from his office was present. Before asking any questions, the agent told Morton that she was not under arrest; she was not being detained; the interview was not mandatory; she could stop talking to them at any time; and she could leave whenever she wanted.

The agent explained that he did not give *Miranda* warnings because they are only required when the individual is in custody. Agent Pontius testified that at no time was Morton handcuffed and the door to the interview room was not locked. She was not deprived of bathroom breaks, food, or water for a significant period of time and was free to leave at any time. After the interview, Morton was not arrested and she was allowed to leave.

Agent Pontius denied telling Morton she did not need an attorney for the interview. Agent Pontius testified he told her he was conducting an investigation, he identified himself as a criminal investigator, and he told her he wanted to ask her some questions concerning the matter she had been interviewed about. He also testified that as a rule, GSA special agents identify themselves with their credentials, which state they are criminal investigators.

The suppression ruling

The trial court granted the motion to suppress. The basis for the trial court's decision is difficult to discern, but the ruling appears to have been based on two grounds: the agent's failure to provide *Miranda*

warnings and the court's conclusion that the agent's conduct was unfair, rendering Morton's statements involuntary.

The State filed an interlocutory appeal. A panel of the Court of Appeals reversed the district court's decision. *State v. Morton*, No. 97,848, unpublished opinion filed July 20, 2007. The panel held that Morton was not in custody and, therefore, Agent Pontius was not required to provide *Miranda* warnings. Morton filed a petition for review, arguing that the Court of Appeals failed to address the district court's determination that the agent's conduct required suppression. We granted review.

Discussion

Our standard of review is well-established. We review a decision suppressing evidence under a mixed standard of review. We determine, without reweighing the evidence, whether the facts underlying the trial court's decision are supported by substantial competent evidence. We then conduct a de novo review of the district court's legal conclusion drawn from those facts. *State v. Jones*, 283 Kan. 186, 192, 151 P.3d 22(2007).

1. Does the failure to provide Miranda warnings require that Morton's statements be suppressed?

As this court recently explained in *State v. Jones*, 283 Kan. at 192, the Miranda rule was designed to safeguard the Fifth Amendment privilege against self-incrimination by reducing the risk of a coerced confession:

> The Fifth Amendment to the United States Constitution guarantees the right against self-incrimination, including the right to have a lawyer present during custodial interrogation and the right to remain silent. "[T]o reduce the risk of a coerced confession and to implement the Self-Incrimination Clause" (Chavez v. Martinez, 538 U.S. 760, 790, 155 L. Ed. 2d 984, 123 S. Ct. 1994 [2003] [Kennedy, J., concurring in part and dissenting in part]), the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), concluded that states may not use statements stemming from a custodial interrogation of a defendant unless the State demonstrates the use of procedural safeguards to secure the defendant's privilege against self-incrimination.

Miranda warnings are not required whenever police question someone. "'*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Jones*, 283 Kan. at 192–93 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 97 S. Ct. 711 [1977]). This limitation arises out of the basis for the rule itself—concern for the compelling pressures inherent in a custodial interrogation:

> To dissipate "the overbearing compulsion . . . caused by the isolation of a suspect in police custody," [citation omitted] the *Miranda* Court required the exclusion of incriminating statements obtained through custodial interrogation unless the suspect fails to claim the Fifth Amendment

> privilege after being suitably warned of his right to remain silent and of the consequences of his failure to assert it. [Citation omitted.] We have consistently held, however, that this extraordinary safeguard "does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Minnesota v. Murphy*, 465 U.S. 420, 430, 79 L. Ed. 2d 409, 104 S. Ct. 1136 (1984).

See also *Oregon v. Mathiason*, 429 U.S. at 495 (stating that it is the coercive environment of the custodial interrogation "to which *Miranda* by its terms was made applicable, and to which it is limited").

A two-part inquiry is used to determine whether an interrogation is custodial for purposes of *Miranda*. The first prong is: what were the circumstances surrounding the interrogation? We review that determination under a substantial competent evidence standard. The second prong of the inquiry is: under the totality of those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave? We apply a de novo standard of review to that determination. *State v. Jones*, 283 Kan. at 194.

Thus, our first task is to determine whether the district court's findings of fact concerning the circumstances surrounding the interrogation are supported by substantial competent evidence. The following factors are to be considered in analyzing the circumstances surrounding the interrogation:

"(1) when and where the interrogation occurred; (2) how long it lasted; (3) how many police officers were present; (4) what the officers and defendant said and did; (5) the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door; (6) whether the defendant is being questioned as a suspect or a witness; (7) how the defendant got to the place of questioning, that is, whether he came completely on his own in response to a police request or was escorted by police officers; and (8) what happened after the interrogation—whether the defendant left freely, was detained, or was arrested." *Jones*, 283 Kan. at 195 (quoting *State v. Deal*, 271 Kan. 483, 495, 23 P.3d 840 [2001], *abrogated on other grounds by State v. Anthony*, 282 Kan. 201, 214, 145 P.3d 1 [2006]).

These factors are not to be applied mechanically or treated as if each factor bears equal weight. As we said in *Jones*, each case needs to be analyzed on its own facts; some factors will present in one case and not in another, and the importance of each factor may vary from case to case. *Jones*, 283 Kan. at 195.

Morton contends the following factors support a finding of custody: (1) what the agent and the defendant said and did; (2) whether the defendant was being questioned as a witness or suspect; and (3) what happened after the interview.

What the agent and the defendant said and did

Morton contends that while she believed the interview was administrative in nature, the agent's

actual purpose was to provide additional information for the county attorney. According to Morton, Agent Pontius' statements that the interview was informal and not the kind of interview she would need any attorney for were deceptive, leading her to believe that the interview was not a criminal investigation when it was.

It appears the district court found it significant that the purpose of the interview was to obtain and provide the county attorney with additional information to aid in pursuing criminal charges, while Morton believed the criminal investigation was over. Substantial competent evidence supports the conclusion that the purpose of the interview was criminal in nature and that Morton was unaware of that fact until the conclusion of the interview.

The district court did not make any specific finding of fact on the disputed matter of whether the agent told Morton she did not need a lawyer because it was not that kind of interview. The district court did, however, conclude that the agent's conduct was unfair, thus requiring suppression. When we apply the mixed standard of review, we do not reweigh testimony or pass on the credibility of witnesses. Instead, we accept as true the evidence and all inferences to be drawn therefrom that support the findings of the trial court and disregard any conflicting evidence or other inferences that might be drawn therefrom. *State v. Orr*, 262 Kan. 312, 322, 940 P.2d 42 (1997). Thus, we accept Morton's version of events as true.

Whether the defendant was being questioned as a suspect or witness

As Morton notes, there is no dispute Agent Pontius considered her to be a suspect, not a witness. The district court's decision appears to be based, in part, on the fact that Morton was the focus of the investigation. Accordingly, substantial competent evidence supports the finding that Morton was being questioned as a suspect.

What happened after the interview

On this factor, Morton points out the evidence established that Agent Pontius told her he would be sending a copy of his report of the interview to the county attorney. Subsequently, the criminal case was filed and she surrendered herself to law enforcement in lieu of a formal arrest. The district court did not make any findings concerning what happened after the interview. It is obvious, however, that this criminal case was initiated not long after the agent's interview. Accordingly, substantial competent evidence supports this factor.

In summary, we find the following circumstances surrounding the interrogation are supported by substantial competent evidence. Morton believed the criminal investigation had concluded with no criminal charges to be filed. When she was contacted by Agent Pontius, she believed his involvement was administrative in nature. The agent was conducting a criminal investigation, and Morton was a suspect. The agent told Morton the interview was informal, and when she asked whether she would need a lawyer for the interview, the agent told her no, it was

not that kind of interview. Morton agreed to meet Agent Pontius at the police department. She drove herself to the interview, which was held at the police department. The interview took place in a break room, not in a regular interview room. There were two agents present. *Miranda* warnings were not given. Before questioning began, Morton was told she was not under arrest; she could refuse to answer questions; and she could terminate the interview and leave at any time. The room was not locked; Morton was not handcuffed; and she was not physically restrained in any way. After the interview, the agent told Morton the matter was back at the county attorney's office, and that he would be providing a copy of his report to the county attorney. Morton was allowed to leave the interview. Later, Morton was prosecuted.

Having determined the circumstances surrounding the interrogation, our next task is to determine whether, under the totality of those circumstances, a reasonable person would have felt he or she was not at liberty to terminate the interview and leave. *Jones*, 283 Kan. at 194. We use an objective standard in determining whether an interrogation is custodial:

> The question of whether an interrogation is custodial must be determined based on an objective standard of how a reasonable person in the suspect's situation would perceive his or her circumstances. Courts must examine all of the circumstances surrounding the interrogation and determine how a reasonable person in the position of the individual being questioned would gauge the

breadth of his or her freedom of action. 283 Kan. 186, Syl. ¶ 3.

Our task is made difficult by the fact that neither Morton nor the State argue this prong of the inquiry. Morton argues only that had she been given *Miranda*, and had she been told that the interview was a criminal investigation for the purpose of providing additional information to the county attorney, she would have had an attorney present. Under these circumstances, Morton argues, the failure to give *Miranda* warnings was fundamentally unfair.

The problem with Morton's argument is that her beliefs about the nature of the interview and the subjective intentions of the agent are only relevant to the custody inquiry *if* they would have caused a reasonable person to believe he or she was not free to terminate the interview and leave. As we noted in *Jones*, custody "'depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.'" *Jones*, 283 Kan. at 193 (quoting *Stansbury v. California*, 511 U.S. 318, 323, 128 L. Ed. 2d 293, 114 S. Ct. 1526 [1994]).

Under this standard, an officer's intent, purpose, and views concerning the nature of the interrogation and whether the individual is a suspect are relevant to the determination of custody only if they were communicated to or otherwise made known to the individual being questioned and if they would have affected how a reasonable person would have perceived his or her freedom to leave:

> It is well settled then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*. [Citation omitted.] The same principle obtains if an officer's undisclosed assessment is that the person being questioned is not a suspect. In either instance, one cannot expect the person under interrogation to probe the officer's innermost thoughts. Save as they are communicated or otherwise manifested to the person being questioned, an officer's evolving but unarticulated suspicions do not affect the objective circumstances of the interrogation or interview, and thus cannot affect the *Miranda* custody inquiry. "The threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with the strength of an interrogating officer's suspicions." [citation omitted.] *Stansbury v. California*, 511 U.S. at 324–25.

See also *Jones*, 283 Kan. at 193 (discussing the objective standard under *Berkemer v. McCarty*, 468 U.S. 420, 82 L. Ed. 2d 317, 104 S. Ct. 3138 [1984]; *Stansbury*); *State v. Fritschen*, 247 Kan. 592, 597–603, 802 P.2d 558 (1990) (discussing the development of the objective standard and holding that the fact a suspect is the focus of the investigation is relevant under the objective standard only if the suspect was aware he or she was the focus and a reasonable person in the suspect's position would have felt that because of this he or she was in custody); *State v. James*, 276 Kan. 737, 752, 79 P.3d 169 (2003)

(existence of an out-of-state felony warrant that required the defendant be detained, which was known to the officers but not the defendant, did not convert interview into a custodial interrogation because the custody test is based on an objective standard).

Under this objective standard, Agent Pontius' focus on Morton as a suspect, his purpose in conducting the interview, and his intent to reinstigate charges are relevant to the determination of custody for purposes of *Miranda* only if they were communicated to or otherwise made known to Morton and would have affected how a reasonable person would have perceived his or her freedom to terminate the interview and leave. The evidence establishes that Morton was unaware of any of that until the end of the interview. Accordingly, Agent Pontius' subjective knowledge, purpose, plan, and intent are not relevant to the objective custody inquiry.

Similarly, Morton's subjective beliefs concerning the nature of the interview have no bearing on the custody inquiry. The determination of custody for purposes of *Miranda* is determined by the objective circumstances, not by the subjective view harbored by the person being questioned. *Jones*, 283 Kan. at 193. In *Yarborough v. Alvarado*, 541 U.S. 652, 158 L. Ed. 2d 938, 124 S. Ct. 2140 (2004), the Supreme Court held that a suspect's prior experience with law enforcement is not a relevant factor in the custody inquiry. The Court distinguished the objective *Miranda* custody inquiry from other types of inquiries, like the voluntariness of a confession, that

are based on the mindset and characteristics of the particular suspect. *Alvarado*, 541 U.S. at 667–68. An objective test "furthers 'the clarity of [the *Miranda*] rule,' [citation omitted] ensuring that the police do not need 'to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect. [Citation omitted.]'" *Alvarado*, 541 U.S. at 667. Allowing the suspect's individual characteristics to be a part of the custody analysis, even if styled as an objective test—what would a reasonable person of the suspect's age, experience level, etc. have believed—would ruin this clarity, as it would require police officers to consider a suspect's mindset when faced with deciding whether they are required to give *Miranda* warnings. *Alvarado*, 541 U.S. at 667–69.

Morton also argues the agent's statement that she did not need a lawyer because it was not that kind of interview was a lie and was intended to deceive her about the criminal nature of the interview. This, she argues, violated her rights under *Miranda*. Accordingly, we must determine whether lies or deceptions are relevant to the custody inquiry.

A police officer's comment about the need for a lawyer was at issue in *State v. Haddock*, 257 Kan. 964, 897 P.2d 152 (1995), *abrogated on other grounds by State v. James*, 276 Kan. 737, 79 P.3d 169 (2003). Although the interview was noncustodial, the officer read *Miranda* rights before questioning Haddock. At the point where the officer advised Haddock of his right to have a lawyer present, Haddock asked, "Is there any reason for me to?" 257 Kan. at 975. The

officer responded, "Not at this point, I don't." 257 Kan. at 975.

Haddock argued the officer's statement was misleading, deceptive, and tainted the waiver of his *Miranda* rights. 257 Kan. at 975. The district court denied suppression, ruling that Haddock was not in custody during the interview. On appeal, Haddock argued that the officer's response to his question about the need to have a lawyer present violated his *Miranda* rights. He argued that the noncustodial nature of the interrogation was irrelevant because *Miranda* warnings were given. This, he argued, triggered *Miranda*'s protections and, thus, the officer was required to "'honor the defendant's constitutional rights[,]'" even in a noncustodial setting. 257 Kan. at 976. The court disagreed, holding that *Miranda*'s protections simply do not exist outside of the context of a custodial interrogation:

> Custody would not matter if Haddock was contending that his statements were obtained through coercion, threats, or duress, or other involuntary means violating due process. See *United States v. Chalan*, 812 F.2d 1302, 1307 (10th Cir.1987) (noting that even if *Miranda* rights are not violated, statements may be inadmissible if made involuntarily). However, the "constitutional rights" Haddock seeks to enforce—the safeguards against self-incrimination established by *Miranda*—do not exist outside "custodial interrogation." See, e.g., *United States v. Ritchie*, 35 F.3d 1477, 1485 (10th Cir.1994); *State v. Fritschen*, 247 Kan. 592, 597, 802 P.2d 558 (1990)

("*Miranda* only applies if the interrogation was custodial."). Although we have never addressed the question directly, other courts have held that the giving of *Miranda* warnings, itself, does not transform a noncustodial interrogation into a custodial interrogation. *United States v. Charles*, 738 F.2d 686, 693 n.6 (5th Cir.1984); *United States v. Lewis*, 556 F.2d 446, 449 (6th Cir.), *cert. denied* 434 U.S. 863. 257 Kan. at 976–77.

Although our holding in *Haddock* was that giving *Miranda* warnings in a noncustodial setting does not make the interview custodial, it is at least implicit in the decision that the officer's comment about the need for a lawyer is not relevant to the determination of custody for purposes of *Miranda*. *Cf. Oregon v. Mathiason*, 429 U.S. at 495–96 (falsely telling a suspect that his fingerprints were found at the scene not relevant to whether the respondent was in custody for purposes of *Miranda*). Accordingly, in considering whether a reasonable person in Morton's situation would have felt free to terminate the interview and leave, the agent's undisclosed purpose and intent, Morton's subjective beliefs about the nature of the interview, and the agent's comment about the need for a lawyer are not relevant.

Setting those circumstances aside, the totality of the remaining relevant circumstances supports the conclusion that a reasonable person would have felt free to leave the interrogation. Morton agreed to meet with Agent Pontius, and voluntarily drove herself to the police station to be interviewed. The interview took place in a break room; the room was not locked;

and she was not handcuffed or restrained in any way. Agent Pontius told her she was not in custody; she could refuse to answer questions; and she was free to leave at any time. Morton was allowed to leave at the end of the interview.

Although this issue is decided on a case-by-case basis, case law supports the conclusion that under these circumstances, a reasonable person would not have believed himself or herself to be in custody. See *State v. Jones*, 283 Kan. at 196–200 (interview noncustodial where, although defendant was under subpoena and was arrested after the interview, he came to the interview voluntarily, officers told him he was not in custody and that the interview was voluntary, he was not restrained or threatened, and he was initially questioned as a witness); *State v. James*, 276 Kan. 737 (interview noncustodial where defendant went to police station voluntarily, defendant was initially questioned as a witness, officer told defendant he was not under arrest, defendant was not restrained, defendant had access to cell phone and pager, and defendant was arrested at end of interview on outstanding Missouri warrant); *State v. Jacques*, 270 Kan. 173, 186–87, 14 P.3d 409 (2000) (first interview at police station was noncustodial, defendant was free to go, interview took place in interview room, officers drove defendant to police station, defendant left freely after the interview, interview lasted over 2 hours, and the defendant was not a suspect); *State v. Heath*, 264 Kan. 557, 591, 957 P.2d 449 (1998) (as cited in *Jones*, 283 Kan. at 199) (interview was not custodial where defendant went to the police station voluntarily to be

interviewed and waited unrestrained in waiting room prior to interview); *State v. Fritschen*, 247 Kan. at 604–05 (interview noncustodial where defendant voluntarily went to police station to be interviewed, he was informed he was not under arrest and was free to leave, only two officers were present, officers did not yell at or threaten defendant, defendant was not handcuffed or restrained, officers started to take defendant home at one point, and the officers told defendant he could consult a lawyer and they would honor such a request).

Morton relies on *State v. Deal* in support of suppression. In Deal, the police wanted to speak to the defendant as part of their investigation into the disappearance and death of Aubry Phalp. Officers located Deal and asked him to come to the police station to speak with them about Phalp's disappearance. They did not inform him that Phalp had been found dead just the day before. Deal agreed and drove to the police department while the police followed. Deal was interviewed without *Miranda* warnings.

The trial court denied Deal's motion to suppress. On appeal, Deal argued the following circumstances surrounding the interrogation demonstrated that he was in custody: (1) the interrogation took place in the early evening and at the police station; (2) it lasted about 3 hours; (3) there were two detectives present during most of the interview; (4) the detectives never told him he was free to leave; (5) the detectives told him they were investigating Phalp as a missing person and did not reveal that it was actually a

homicide investigation, as Phalp had been found dead; (6) although he was not in handcuffs, Deal was in a locked interview room; (7) the detectives continually asked him about his whereabouts the weekend of Phalp's death and asked him to take a lie detector test after finally admitting they were investigating Phalp's murder; (8) he was escorted to the police station although he went voluntarily; and (9) he was allowed to leave freely after the interview ended. *Deal*, 271 Kan. at 498.

The State argued that the following circumstances showed that Deal was not in custody: (1) Deal willingly went to the police station; (2) although Deal was never told he was free to leave, the officers would have allowed him to leave at any time if he had wanted to; (3) Deal was not handcuffed or placed under arrest; and (4) Deal never asked to make any phone calls or asked for anyone else to be present. 271 Kan. at 498–99.

We affirmed the trial court's ruling that Deal was not in custody, holding that under those circumstances, a reasonable person would not have understood the situation to be a custodial interrogation. 271 Kan. at 499.

Deal does not support suppression in this case. The circumstances here are even less likely to have caused a reasonable person to have believed he or she was in custody than in *Deal*. In *Deal*, the defendant was escorted to the police department, while here, Morton drove unescorted to the police station. Deal was never told he was free to leave, while here, Morton was specifically told that she was not under

arrest, she could refuse to answer questions, and she could leave at any time. And in *Deal*, the interview room was locked, while here the interview took place in an unlocked break room.

In summary, the Court of Appeals correctly concluded that because Morton was not in custody, the agent was not required to administer *Miranda* warnings. Thus, the Court of Appeals was correct in holding that the district court erred in ordering Morton's statements suppressed for failure to give *Miranda* warnings. However, that is not the end of the analysis. The Court of Appeals failed to address the other component of the trial court's ruling—whether the conduct of the agent in this case rendered Morton's statements inadmissible under the voluntariness standard.

2. Did the agent's conduct render Morton's statements involuntary and, thus, inadmissible?

Unwarned inculpatory statements obtained through noncustodial interrogation, although not barred by *Miranda*, may nevertheless be inadmissible if they were obtained in violation of the due process voluntariness requirement. See *State v. Haddock*, 257 Kan. at 976 (citing *United States v. Chalan*, 812 F.2d 1302,1307 [10th Cir.1987]). As the United States Supreme Court has stated:

> We recognize of course that noncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where "the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about

> confessions not freely self-determined . . . ." [Citation omitted.] When such a claim is raised, it is the duty of an appellate court, including this Court, "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." [Citation omitted.] *Beckwith v. United States*, 425 U.S. 341, 347–48, 48 L. Ed. 2d 1, 96 S. Ct. 1612 (1976).

Thus, there is a two-tiered standard for admissibility of a defendant's statements to law enforcement officers:

> [A]lthough the *Miranda* standard is the first line of inquiry in every case, the voluntariness standard is the ultimate criterion for the admissibility of a confession. Violation of *Miranda* terminates the inquiry, the confession being per se inadmissible. Conformity with *Miranda*, however, merely triggers the second line of analysis—the voluntariness standard.
>
> . . . .
>
> The two-tiered analysis of confessions . . . is required because the Supreme Court has held that *Miranda* does not coincide with the constitutional standard of voluntariness, but is only a prophylactic procedure to aid in the determining the admissibility of confessions. 3 Ringel, Searches & Seizures, Arrests and Confessions § 24:5 (2d ed.1993).

The agent's undisclosed purpose for the interview, Morton's subjective beliefs about the civil nature of the interview, and the agent's comment about the need for an attorney are not relevant to the issue of

whether Morton was "in custody" for purposes of *Miranda*. These circumstances may nevertheless be relevant to a claim that her statements were inadmissible under the due process voluntariness standard. In this case, it appears the district court determined that the agent's conduct was fundamentally unfair and, thus, Morton's statements were not voluntary.

In determining whether a defendant's confession is voluntary, "the essential inquiry . . . is whether the statement was the product of the free and independent will of the accused." *State v. Walker*, 283 Kan. 587, 596, 153 P.3d 1257 (2007). In making this determination, the court considers the following specific factors:

> (1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language. *State v. Walker*, 283 Kan. at 596–97.

In this case, there is no claim that Morton had a mental condition that impacted the voluntariness of her statements. Morton has not claimed the manner or duration of the interview made her statements involuntary. Specifically, there is no evidence the agent was hostile, threatening, or abusive. Further, Morton has not claimed the length of the interview was so long that her will was overborne. She has not claimed she was deprived of the ability to

communicate with the outside world during the interview. And there is no claim that her age, level of education, or background are relevant to the admissibility of her statements. In fact, the evidence showed Morton was 40 years old and has a degree in public administration. Instead, only the fifth factor—the fairness of the officers—is at issue in this case.

The district court cited *State v. Price* in support of its decision concerning the fairness of the agent's conduct. In *Price*, the defendant was an inmate at the Norton Correctional Facility, serving a sentence on another case when he was questioned by a KBI agent. Before the interview, the agent provided the defendant with *Miranda* warnings, but he recited them from memory, rather than reading from the standard form. The warning failed to include the advice that an attorney would be provided if the defendant wanted one, and that he could stop answering questions at any time.

A *Jackson v. Denno* hearing was held to determine the voluntariness of the defendant's statements, and at the conclusion of the hearing the district court ordered the confession suppressed. See 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964). The State appealed on a question reserved. This court, however, refused to entertain the State's appeal because it did not involve a question that would provide helpful precedent to the bench, bar, and law enforcement personnel. *Price*, 247 Kan. at 103–04. This court also noted that the record failed to contain all of the facts the trial court may have taken into consideration in its ruling. *Price*, 247 Kan. at 103.

Price does not support a determination that the agent's conduct in this case requires suppression. The fairness of the officers was not at issue in the *Price* appeal. It appears the only reason *Price* was mentioned by the district court is that it lists the factors to be considered in assessing voluntariness, which list includes the fairness of the officers.

The fairness of the officer in conducting the interrogation

In this case, the district court found the agent's conduct to be unfair because, while Morton believed the criminal investigation had ended with no charges to be filed, the purpose of the agent's interview was to further the criminal investigation and encourage the filing of charges by providing additional information to the county attorney. Additionally, Morton argues that the agent's comment that she did not need an attorney because it was not that kind of interview was fundamentally unfair. Consequently, the issue concerns the extent to which the officer's conduct was unfair and, thus, rendered Morton's statements involuntary.

We have held that false statements to a suspect about the strength of the evidence do not, by themselves, render the suspect's confession involuntary. *State v. Wakefield*, 267 Kan. 116, 128, 977 P.2d 941 (1999). Rather, they must be viewed in conjunction with the totality of the circumstances surrounding the confession to determine whether it was voluntarily made. *State v. Swanigan*, 279 Kan. 18, Syl. ¶ 3, 106 P.3d 39 (2005); see also *State v. Ackward*, 281 Kan. 2, 9–10, 16, 128 P.3d 382 (2006)

(under totality of the circumstances, officers' false statements that included the representation that they had a surveillance camera recording of the defendant, his hands were being swabbed for a gunshot residue analysis that would show whether he had fired or even held a gun in the past 48 hours, there were multiple eyewitnesses, and another person was cooperating with police, did not render confession involuntary).

While telling a suspect false information about the evidence against the suspect, standing alone, does not render a confession involuntary, giving the suspect false or misleading information about the law is more problematic:

> As opposed to giving the suspect false information regarding the status of the investigation against him, misleading the suspect regarding points of law is generally held to invalidate subsequent confessions. Suppression of confessions induced by the latter technique is presumably made on the basis that the use of such deception is fundamentally unfair, since the technique is no more likely to induce untrue confessions than the use of any other falsehoods by the police. 3 Ringel, Searches & Seizures, Arrests and Confessions § 25:8.

See also 2 La Fave, Criminal Procedure 3d, § 6.2(c) (2007) (while misrepresentations about the strength of the government's case by itself is insufficient to render a confession involuntary, "courts are much less likely to tolerate misrepresentations of the law").

In *State v. Ackward*, this court considered the extent to which misrepresentations of the law factored into the determination of the voluntariness of a confession. In that case, the defendant shot the unarmed victim in the back during a drug transaction. We found that the detective misrepresented the law during his interrogation of the defendant when he suggested the killing might have been a reckless homicide, as such a possibility was unlikely under the facts of the case. *Ackward*, 281 Kan. at 14. We also found the detective misled the defendant about the law when he suggested that the killing could be excused as self-defense. *Ackward*, 281 Kan. at 15. We held, however, that suppression was not required as the misrepresentations were not egregious and, although the detective also used false statements of fact, phony forensic analysis, and religious references during the interrogation, under the totality of the circumstances, the defendant's confession "was the product of his free and independent will." *Ackward*, 281 Kan. at 15–16.

In the present case, the agent's conduct did not involve false statements about the evidence against Morton or misrepresentations of the law. Telling Morton she did not need a lawyer because it was not that kind of interview did not misrepresent the law as Morton had no *right* to have an attorney present in a noncustodial interview. See *Minnesota v. Murphy*, 465 U.S. 420, 424, n.3, 79 L. Ed. 2d 409, 104 S. Ct. 1136 (1984) (stating that where the defendant is not "in custody" for purposes of *Miranda*, there is no Fifth Amendment right to have an attorney present at the interview).

Agent Pontius, however, did not tell Morton she had no *right* to have an attorney present, he told her she did not *need* an attorney. In asking the agent whether she needed a lawyer present, Morton was clearly trying to determine whether the interview was part of the criminal investigation. Of course, the agent knew it was. We note that, as a government agent for an agency with both civil and criminal investigative power, the criminal investigatory purpose of the agent's interview was not obvious in the way an interview conducted by police officers and detectives is. Under these circumstances, we conclude the agent's response to Morton's question was an affirmative misrepresentation about the true nature of the interview.

The question then is whether the agent's conduct rendered Morton's statements involuntary. In answering this question, the court considers the conduct in light of the totality of the circumstances. *State v. Swanigan*, 279 Kan. at 32. The essential inquiry is whether the statements were the product of Morton's free and independent will. *Walker*, 283 Kan. at 596.

All other aspects of the circumstances surrounding this interview indicate that Morton's statements were voluntarily made. She was a 40-year-old, college-educated woman who had been involved in a criminal investigation in this very matter. There was nothing coercive about the manner and duration of the interview, and there is no evidence she was deprived of contact with the outside world during the interview. In fact, she was explicitly told she did not

have to answer any questions, she could stop the interview at any time, and she was free to leave at any time. However, Morton had an attorney who had represented her during this criminal investigation concerning the trailers and it was her intent and desire to have the benefit of the advice and presence of counsel in this criminal investigation. Had she known Agent Pontius was conducting a criminal investigation, she would not have agreed to the interview without the advice and presence of counsel. We consider this in conjunction with the facts that Morton believed the criminal investigation had ended and the agent's status as a criminal investigator was not patently apparent. Under these circumstances, by reason of the agent's conduct, Morton's participation in the interview and the statements given therein were not the product of her free and independent will. Accordingly, Morton's statements were involuntary and, thus, inadmissible.

The decision of the Court of Appeals is reversed, and the district court's decision is affirmed.

McFARLAND, C.J., dissenting: I respectfully dissent from the majority's conclusion that Agent Pontius' conduct rendered Morton's statement involuntary and inadmissible.

I do not disagree that, under the unique facts of this case, the agent's response to Morton's question about whether she would need an attorney for the interview was an affirmative misrepresentation about the criminal nature of the interview. I further agree that the agent's response that the interview was nothing she would need a lawyer for, is to be

considered as part of the totality of the circumstances in determining whether Morton's statement was the product of her free and independent will. *State v. Walker*, 283 Kan. 587, 596, 153 P.3d 1257 (2007). What I disagree with is with the majority's conclusion that, under the totality of the circumstances in this case, the agent's comment rendered Morton's statements involuntary.

As the majority states, "[a]ll other aspects of the circumstances surrounding this interview indicate that Morton's statements were voluntarily made." Specifically, Morton was a 40-year-old, college-educated woman who had been involved in a criminal investigation in this very matter. After her calls to her attorney about the agent's desire to interview her went unanswered, Morton took it upon herself to contact the agent directly. She voluntarily agreed to meet the agent at the police station. There was no undue pressure to participate in the interview. She drove herself to the interview. The interview was held in a break room, not in an interrogation room. It is undisputed that at the start of the interview Morton was told the interview was voluntary, she could refuse to answer questions, and she was free to leave at any time. During the interview, the door to the break room was not locked, nor was Morton handcuffed or restrained in any way. The interview lasted only a little over 2 hours. There is no evidence that during the interview she was denied breaks or contact with the outside world. At the conclusion of the interview she was allowed to leave. Under these circumstances, there was simply nothing that would

support a finding that Morton's statement was involuntary.

Notwithstanding all of that, the majority concludes that the agent's comment, standing alone among this overwhelming abundance of circumstances demonstrating that Morton's statement was the product of her free and independent will, was sufficient to render her statement involuntary. Although we have not addressed a situation like this one, it is well settled that deceptive interrogation tactics do not, standing alone, establish coercion. See *State v. Harris*, 279 Kan. 163, 170, 105 P.3d 1258 (2005) (citing *State v. Wakefield*, 267 Kan. 116, 127–28, 977 P.2d 941 [1999], for the proposition that deceptive interrogation techniques alone do not establish coercion); see also *State v. Swanigan*, 279 Kan. 18, 32, 37, 106 P.3d 39 (2005) (deceptive police tactics standing alone do not render a confession involuntary; instead, such tactics are to be considered as a factor in the totality of the circumstances); *State v. Wakefield*, 267 Kan. at 127–28 (officers' conduct in misrepresenting their motivations and lying to the defendant about the evidence against him does not make a confession involuntary as long as the statements are the product of the defendant's free and independent will).

The majority does not cite, nor is there any case in which we have found deceptive interrogation tactics, standing alone, were sufficient to render an otherwise voluntary confession involuntary. Indeed, we have found confessions voluntary where deceptive police conduct has been part of a totality of

circumstances much more coercive than those present in this case. As noted in the majority opinion, in *State v. Ackward*, 281 Kan. 2, 128 P.3d 382 (2006), we held that the defendant's confession was not involuntary under a totality of circumstances which included the officers' misrepresentations of the law concerning the applicability of self-defense and reckless homicide, false statements that there was a surveillance camera recording, there were multiple eyewitnesses, another person was cooperating with police, and forensic analysis of swabs from the defendant's hands would show whether he had fired or even held a gun in the past 48 hours, as well as appeals to the defendant's religious beliefs.

For this reason, I dissent.

DAVIS, J., joins in the foregoing dissenting opinion.

DAVIS, J., dissenting: I join with Chief Justice McFarland in her dissent from the majority's conclusion that Agent Pontius' conduct rendered Morton's statement involuntary and inadmissible. I write separately to emphasize that an application of the criteria to determine voluntariness, as set forth in the majority opinion, does not lead to the conclusion that "'the behavior of . . . law enforcement officials was such as to overbear [Morton's] will to resist and bring about confessions not freely self-determined.' [Citation omitted.]" *Beckwith v. United States*, 425 U.S. 341, 347–48, 48 L. Ed. 2d 1, 96 S. Ct. 1612 (1976).

The majority opinion accurately states that a determination as to whether a defendant's confession

is voluntary—and thus satisfies the requirements of due process—turns on whether the confession is "the product of the free and independent will of the accused. [Citation omitted.]" *State v. Walker*, 283 Kan. 587, 596, 153 P.3d 1257 (2007). The court considers the totality of the circumstances surrounding the statement, including the following factors, as noted by the majority:

> (1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language. *Walker*, 283 Kan. at 596–97; see slip op. at 26.

In my opinion, application of these factors to the circumstances in this case—particularly in light of the previous case law of this court and of the United States Supreme Court—does not support the majority's conclusion that Morton's admissions were involuntarily given.

In this case, we deal with a 40-year-old, college-educated woman working in what appears to be a professional capacity with the Ottawa Recreation Commission (ORC). There is no evidence to suggest that her mental condition was anything other than that of a rational human being. In fact, the majority opinion recognizes that "there is no claim that Morton had a mental condition that impacted the voluntariness of her statements." Slip op. at 26. Likewise, there is nothing in the record to suggest

that at the time she talked with Agent Pontius, she was subjected to undue influence. As the majority states, there is "no evidence the agent was hostile, threatening, or abusive." Slip op. at 26. In short, there is nothing in the record to indicate that Morton's actions and subsequent statements were involuntary in light of the first factor listed in *Walker*.

The manner and duration of the interrogation further suggests voluntariness. First and foremost, the majority concludes that the session was not custodial, as Morton called the agent in response to his phone call to her, agreed on the place to meet for the interview, and drove herself to the session. Slip op. at 15. Morton contacted her attorney but could not reach him before attending the interview and nevertheless decided to meet with Agent Pontius. During the interview, she was told that she did not have to answer any questions and was free to leave anytime she desired, and she was not arrested but left of her own accord. The interview itself lasted for only a brief duration. Thus, the second factor does not support a conclusion other than that her conduct and discussion with Agent Pontius was voluntary.

The third factor—Morton's ability to communicate with the outside world—supports the same conclusion that Morton's statements were voluntarily given. Although the defendant was able to contact her attorney, she elected to go to the interview when the attorney could not be reached. She was free to leave anytime and was not required to answer any questions. She was free to come and go as she

pleased. Morton has never claimed that she was deprived of the ability to communicate with the outside world. Slip op. at 26.

The fourth factor also demonstrates voluntariness. The majority opinion acknowledges that Morton does not claim that "her age, level of education, or background are relevant to the admissibility of her statements." Slip op. at 26. This statement is somewhat misleading because these factors are surely *relevant* to a determination of voluntariness, as our discussion in *Walker* indicates. An examination of these factors demonstrates, however, that her statements were knowingly and voluntarily made. Morton's age and occupation suggest a level of competence in dealing with world problems; her intellect, capable of obtaining a college degree, suggests an above-average intellectual capacity. This is a woman who had been interviewed by the police with her attorney present concerning the same matter—a woman who tried to contact her attorney for the interview in question but could not reach him so consciously decided to go it alone. Her background with this matter was extensive, as well as her background with the legal requirements surrounding surplus property and the demands of her position with the ORC.

In examining these four factors, the majority opinion came to the same conclusion that I do here—that all of these "other aspects of the circumstances surrounding this interview indicate that Morton's statements were voluntarily made." Slip op. at 30. Despite this recognition, however, the majority

concludes that Morton's statements during the interview with Agent Pontius were rendered involuntary *solely* on the basis of the agent's previous statement that the interview was not the sort where she would need an attorney. To put this conclusion into the context of our due process jurisprudence relating to confessions, the majority has determined that the agent's conduct in advising Morton that she did not need an attorney (thus implying that this was not part of a criminal investigation) had the effect of overbearing her will so as to *compel* her to make involuntary statements.

I do not dispute that Agent Pontius' misrepresentation to Morton regarding the nature of the interview was wholly inappropriate or that it must be made crystal clear that his conduct is unacceptable for a professional criminal investigator. I would conclude—as the majority does in this case—that if Morton had known that the criminal investigation was ongoing, she probably would not have gone to the interview. But this conclusion wholly fails to support the conclusion that the interview was anything but voluntary on her part. Instead, as the Chief Justice notes in her dissenting opinion, we have tolerated this sort of material misrepresentation in criminal investigations on numerous occasions, and we have *never* concluded that a misrepresentation of law, standing alone, renders a statement involuntary. I would conclude that although the agent's misrepresentation is certainly a *factor* to be considered in the court's assessment of voluntariness, that factor alone does not indicate that under the totality of the

circumstances, Morton's statements were not the product of a free and independent will.

To reach its conclusion that Agent Pontius' misrepresentation rendered Morton's subsequent statements involuntary, the majority determines that the agent's conduct had the effect of "'misleading the suspect regarding points of law,'" and such legal deception "'is generally held to invalidate subsequent confessions.'" Slip op. at 28 (quoting 3 Ringel, Searches & Seizures, Arrests and Confessions § 25:8 [2d ed.1993]). Interestingly, the majority recognizes that "'giving the suspect false information regarding the status of the investigation against him [or her]'" does not have the same result of rendering a statement involuntary. See Slip op. at 28 (quoting 3 Ringel, Searches & Seizures, Arrests and Confessions § 25:8).

I would conclude that Agent Pontius did not misrepresent the law to Morton. In fact, I question whether we are confronted in this case with a point of law. Even the majority opinion acknowledges that "[t]elling Morton she did not need a lawyer because it was not that kind of interview *did not misrepresent the law* as Morton had no *right* to have an attorney present in a noncustodial interview." (Emphasis added.) Slip op. at 29. Instead, the majority concludes that "the agent's response to Morton's question was an affirmative misrepresentation about *the true nature of the interview*." (Emphasis added.) Slip op. at 30. It strikes me that Agent Pontius' statement had the effect of "'giving the suspect false information regarding the status of the investigation against him

[or her].'" Slip op. at 28. While the agent's statement took the form of legal advice—you do not need an attorney—this is not the type of misrepresentation of the law that might give rise to a voluntariness question. See *State v. Haddock*, 257 Kan. 964, 975, 897 P.2d 152 (1995), *abrogated on other grounds by State v. James*, 276 Kan. 737, 79 P.3d 169 (2003).

Giving due consideration to the totality of circumstances surrounding the interview with particular emphasis on the factors we have considered important in determining whether a particular confession is voluntary, I would conclude that Morton's statement was voluntary. I realize that the resolution of this issue is not a numbers determination based on the factors to be considered, but given the strength of all other factors and the weakness of the one relied on by the majority, I would conclude that Morton's statement was not obtained in violation of her due process rights.

McFARLAND, C.J., joins in the foregoing dissenting opinion.

[Filed July 20, 2007]

No. 97,848

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

KARIN J. MORTON,
Appellee.

MEMORANDUM OPINION

Appeal from Franklin District Court; JAMES J. SMITH, judge. Opinion filed July 20, 2007. Reversed and remanded with directions.

Heather R. Jones, county attorney, and *Stephen A. Hunting*, assistant county attorney, and *Paul J. Morrison*, attorney general, for appellant.

Pantaleon Florez, Jr., of Topeka, for appellee.

Before CAPLINGER, P.J., ELLIOTT, J., and BUKATY, S.J.

Per Curiam: The State brings an interlocutory appeal challenging the trial court's decision granting Karin Morton's motion to suppress. We reverse and remand.

Morton worked for the Ottawa Recreation Commission (ORC) and her responsibilities included

purchasing government surplus equipment. The Kansas Surplus Yard supplied, for example, trailers through a federal program to entities at greatly reduced prices. Personal use of the surplus property was prohibited for a set amount of time following its purchase through the federal program.

Early in 2004, Morton purchased several trailers through the federal program. Paul Schwartz, the director of the surplus program, began to investigate Morton's use of the trailers she had purchased. Schwartz located one of the trailers parked in the yard of Morton's home. The Ottawa Police Department joined the investigation.

A few months after Morton thought the Ottawa police had terminated its investigation of the trailers, she received a call from John Pontius, a federal criminal investigator, requesting an interview. Morton agreed to meet Pontius at the police station. Pontius sought the interview to clarify some facts about the trailer transaction.

At that time, Morton believed the State prosecutor had declined to prosecute charges against her relating to the trailers. Pontius and Morton met at the police station and, before questioning Morton, Pontius explained she was not under arrest and was not being detained. He further informed Morton she could stop talking at any time and leave whenever she wanted.

Pontius considered the interview to be a part of a criminal investigation in which Morton was the prime suspect, but did not *Mirandize* Morton. Pontius and another officer interviewed Morton in an

unlocked room; Morton was not handcuffed or restrained. Pontius thought the interview lasted about an hour; Morton thought the interview lasted about 2 1/2 hours.

During the interview, Morton recognized the "Do You Know" notice provided by the surplus program. The notice outlined the rules and restrictions involved in the trailer transactions. Morton received the notice at the same time she received the invoice for the trailers from the surplus program.

During the interview, Morton told Pontius she parked the trailer in question at her residence and had never taken it to the ballfields for official use. She told Pontius she purchased the trailer as a gift for her husband.

The officers did not arrest Morton as she left the interview; she left on her own.

Later, the State charged Morton with one count of making a false information. She moved to suppress the statements made to Pontius during the interview.

Morton claimed the interview was a custodial interrogation requiring *Miranda* warnings; the State claimed Morton was not in custody. The trial court granted the motion to suppress, finding Morton had previously been informed no charges would be filed; she was questioned by Pontius for the purpose of providing a report to the county attorney's office; and failing to *Mirandize* Morton was fundamentally unfair.

On appeal, the State acknowledges the interview was an interrogation, but it was not a *custodial*

interrogation. Thus, argues the State, *Miranda* warnings were not required.

In reviewing suppression issues, we judge the factual underpinnings by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard with our independent judgment. In this regard, we do not reweigh evidence, pass on witness credibility, or resolve conflicts in the evidence. *State v.. Ackward*, 281 Kan. 2, 8, 128 P.3d 382 (2006).

It is now hornbook law that under *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 86 S. Ct. 1602, *reh. denied* 385 U.S. 890 (1966), states may not use statements stemming from custodial interrogation unless the State demonstrates the use of procedural safeguards to secure a defendant's privilege against self-incrimination.

But, police are not required

> to administer *Miranda* warnings to everyone whom they question. *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 97 S. Ct. 711 (1977). Rather, "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" [Citation omitted.] *State v. Jones*, 283 Kan. 186, 192–93, 151 P.3d 22 (2007).

We determine whether an interrogation was custodial on a case-by-case basis, and we utilize a two-step process. *Jones*, 283 Kan. at 193–94. First, we examine the circumstances surrounding the interrogation. And second, we decide whether under those circumstances a reasonable person would feel

he or she was not at liberty to terminate the investigation and leave. *Jones*, 283 Kan. at 193–94.

In this regard, the fact a person is a suspect does not, by itself, make an interrogation custodial. *Jones*, 283 Kan. at 197–98. Further, an interrogation is not custodial merely because it takes place in the police station or because the interviewed person is one suspected by the police. *Miranda* warnings are required only where there is such a restriction on a person's freedom to render that person in custody. 283 Kan. at 198.

The trial court based its decision to suppress on the "fundamental unfairness" of the situation:

> I consider the evidence that she was told she could leave at any time. I consider that she was not given the *Miranda* warning. It appears to the court that there was a fundamental unfairness in this. That she had previously been informed that no criminal charges were being filed after being investigated. She was questioned by this investigator with the purpose of providing the county attorney's office the subject of such report. At least aide in the re-instigation of the charges.
>
> I believe that there's a fundamental unfairness and I therefore sustain the Motion to Suppress and will so order.

There is evidence to support the trial court's abbreviated factual findings, but the trial court's legal conclusion that Morton's statements should be suppressed is another matter.

The trial court relied on two cases in support of its decision to suppress. *State v. Deal*, 271 Kan. 483, 23 P.3d 840 (2001), *rev'd on other grounds State v. Davis*, 282 Kan. 666, 138 P.3d 510 (2006); *State v. Price*, 247 Kan. 100, 795 P.2d 57 (1990). Neither case supports the suppression order here under review.

In *Deal*, a detective told defendant they were investigating a missing person case, even though they were, in fact, investigating a homicide. Though not in handcuffs, defendant was interviewed in a locked room which he could not leave without being "buzzed" out.

Defendant was never told he was free to go and was not given *Miranda* warnings. The trial court denied defendant's motion to suppress, and the Supreme Court affirmed, ruling the interview was "a mere investigatory interrogation and not a custodial interrogation." 271 Kan. at 498–99.

In *Price*, defendant was already in custody for other crimes when the officers interrogated him. The officers gave defendant an incomplete *Miranda* warning, failing to inform defendant of his right to an attorney, and that the questioning would stop if he asked for an attorney. The trial court suppressed the evidence based on the officers' incomplete *Miranda* warning. The Supreme Court affirmed the suppression but did not analyze the custody issue. Rather, the Supreme Court decided there was not an adequate record to permit appellate review of the question. 247 Kan. at 103–04.

Here, unlike in *Price*, we have a sufficient record to provide review of the trial court's conclusions Morton

was in custody during the interrogation. And, as in *Deal*, Morton was not handcuffed and was free to leave at any time. Under the circumstances presented here, Morton was not in custody, and thus Pontius was not required to read her the *Miranda* rights.

The trial court erred in suppressing the statements.

Reversed and remanded for further proceedings.

(2)

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No. 08 –402

OCT 28 2008

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,

Petitioner,

v.

KARIN J. MORTON

Respondent.

On Petition For A Writ Of Certiorari
To The United States Supreme Court

BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

In *Colorado v. Connelly*, 479 U.S. 157, 167 the Court held "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." In this case, the Kansas Supreme Court held that a suspect's confession was rendered involuntary for due process purposes because a government agent made a single misleading but non-coercive statement to the suspect, even though the court explicitly found that (1) there was no Miranda violation, (2) the agent made no false statements about the evidence against the suspect nor about the applicable law, and (3) "there was nothing coercive about the manner and duration of the interview."

This case thus presents the following questions:

Whether police deception standing alone, can render an otherwise voluntary confession "involuntary" for due process purposes?

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PETITION IN OPPOSITION TO THE WRIT OF CERTIORARI

Karin J. Morton, Respondent, respectfully requests that this Court deny the Petitioner's petition for a writ of certiorari and uphold the findings of the Kansas Supreme Court in the cited matter.

OPINIONS BELOW

The July 3, 2008, opinion of the Kansas Supreme Court (Pet. App. 1a-44a) is reported at 186 P.3d 785 (Kan.2008). The Kansas Court of Appeals opinion (Pet. App.45a-51a) is unpublished. No. 97,848, 2007 WL 2080540 (Kan.Ct.App. July 20, 2007.

JURISDICTION

The Kansas Supreme Court rendered its decision on July 3, 2008. This brief in opposition of the petition for writ of certiorari has been filed within 30 days of docketing, as required by Supreme Court Rule 15.3. This Court has jurisdiction pursuant to 28 U.S.C. 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

"nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

U.S. CONST. amend. V

"In all criminal prosecutions, the accused shall . . . and to have the Assistance of Counsel for his defense"

U.S. CONST. amend VI

"Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV

COUNTERSTATEMENT OF THE CASE

1. The respondent understands it is not the role of this court to re-weigh evidence, however the Statement as authored by the Petitioners is riddled with fallacies of fact that bear on the case at hand. The Respondent Karin J Morton did in fact work for the Ottawa Recreation Commission (ORC), a taxpayer-funded, local government entity that provides recreation services for the USD #290 taxing district, not for the City of Ottawa, Kansas. The Respondent was authorized to purchase surplus state as well as federal government property.

The Respondent purchased 2 federal surplus trailers at a federal surplus liquidation, one for the ORC and one, intended at the time of purchase, for personal use. It is important to note that additional trailers were purchased by other employees of the ORC. It was the first visit by the staff to the federal surplus property yard. Prior purchases were made through the State Surplus Property system which openly allowed for personal purchase of surplus property. Upon purchase of the items at the Federal site, it is well documented in lower court transcripts that none of the individuals including the Respondent were made aware by federal surplus property officials that Federal property was subject to more restrictive rules specifically, federal surplus property was to be used solely for public purposes.

ORC staff members became aware of the federal surplus buying regulations several weeks after the purchase when the invoices arrived. Upon discovery, the Respondent abandoned her desire of purchasing a trailer as a gift for her husband and other employees that made similar purchases did the same. The ORC retained ownership and control of all property purchased from Federal Surplus. The respondent was instructed by the Administrative Board of the ORC to leave the trailer where it was (at the respondents permanent address) until instructed to do otherwise.

Verification documentation was later received by the ORC discussing the utilization of the acquired property. Several months later, the respondent, as noted in the record, hurriedly fill out certification paperwork as she was leaving town for vacation. All certification documents were filled out in the same manner - regardless of which piece of equipment was noted. The respondent did not as a matter of record verify with any employee which piece of equipment was which. The forms were filled out based upon her knowledge of usage at that time

The Petitioner's statement contains a distorted order of events that presents the basis of the case at hand in a purposely biased fashion. Contrary to the Petitioner's statement, Paul Schwartz did not "notice" a trailer at the Respondent's residence. The ORC, under Morton's leadership self-reported an error in purchase. An investigation was sponsored by the ORC Board as well as an independent counsel. It was ruled the employees, cluding the Respondent, did nothing intentional. Upon conclusion of this investigation

a disgruntled community member filed a theft report solely against the Respondent. It was this community member that sought out Paul Schwartz and, through a faxed communication to his office portrayed the event in an entirely different light as well as insinuated there was a "cover-up" by the ORC board. The original police report notes the complaintant to be Janice Swallow.

An investigation was conducted into the trailer purchase. The respondent and her counse cooperated with the OPD investigation at every step. Upon the conclusion, the police department and the County Attorney Heather Jones publicly announced the investigation had concluded and there were "no grounds for prosecution".

Months later, Special Agent John Pontius of the Government Service Administration (GSA) contacted the Respondent for a "follow-up" interview. The GSA is the official procurement agency for federal entities – substantially administrative in nature. Agent Pontius entered into the latter stages of the ORC sponsored investigation as the administrative authority that would ultimately decide whether or not the ORC was allowed to retain ownership of the trailers or be instructed to return them to the Federal Surplus lot

Pontius did in fact attempt to contact the Respondents counsel of record, however it is important to note that attorney Scott Ryburn, respondent's counsel, had at that juncture

joined local government as the County Counselor, working along side of County Attorney Heather Jones.

The Respondent did agree to meet with Pontius. The Respondent specifically inquired as to the nature of the interview as well as the need to have counsel present. Contrary to the statement of the petitioners, Pontius testified that it was "not that kind of interview" at the suppression hearing this fact is reflected in the transcript. As had been demonstrated by the Respondent through previous interviews, each and every interview attended with counsel, had the true nature of the interview been revealed, the Respondent would have certainly appeared with counsel and requested the benefits afforded by a standard interview room, equipped with audio and video recording capability. Agent Pontius clearly interfered with the respondent's access to legal counsel.

The District Court ruled that in evaluating the "totality of the circumstances" issues regarding Miranda, issues regarding the right to counsel, and issues regarding the voluntaries and free will of the respondent's statement and most importantly the intentional misrepresentations of Agent Pontius that a fundamental unfairness was created, therefore, the motion to suppress was sustained.

The Kansas Court of Appeals focused solely on the Miranda issue and reversed the trial court. However the appeals court did recognize the lower courts findings of evidence supporting suppression.

The Respondent filed and was granted review on the basis of the "totality of the circumstances". On review, the Supreme Court struggled with many elements of the case finding various actions in regards to liberties guaranteed through the Fifth, Sixth and Fourteenth amendments. An audio record of the Kansas Supreme Court oral argument on this case can be accessed at http://www.kscourts.org/kansas-courts/supreme-court/archived-arguments-March-2008.asp.

Under the "totality of the circumstances, the Kansas Supreme Court reversed the lower court's ruling citing that the conduct of Agent Pontius in noting the interview was "not that kind of interview" coupled with the fact that Pontius's status as a criminal investigator was not patently apparent to the Respondent, statements given or reported to be "given therein were not the product of her free and independent will and thus inadmissible".

Citing State v. Swanigan, the court states ""In determining whether a confession is voluntary, a court is to look at the totality of the circumstances. The burden of proving that a confession or admission is admissible is on the prosecution, and the required proof is by a preponderance of the evidence. Further the case law states "the essential inquiry in determining the voluntariness of a statement is whether the statement was the product of the free and independent will of the accused." (quoting *State v. Baston*, 261 Kan. 100, 105, 928 P 2d 79 [1966]). Additionally, the Court cited Beckwith v. United States. , State v. Ackward, and State v. Walker as precedence for the ruling.

The Court noted the importance of the fact that Agent Pontius mislead the Respondent about the nature of the interview – he had consorted with the County attorney to obtain additional information on her behalf, yet when specifically asked by the Respondent the nature of the interview – i.e. – "do I need my attorney present" – Pontius noted it was "not that kind of interview". Pontius knew Morton HAD an attorney that had accompanied her to prior interviews yet denied any need for his presence and in this act deceived the Respondent as to the criminal nature of the interview.

In addition, Pontius was not a uniformed officer, his business card states "Special Agent" not criminal investigator as the Petitioners have suggested. The noted factors in the present case clearly posed significant barriers to the respondent's statements being made of her free and independent will. This Court has held that this prong is an essential inquiry to determining voluntariness of the statement.

REASONS FOR DENYING THE WRIT

1. The question for review is flawed as stated by the Petitioner's. The Kansas Supreme Court did not rule that police deception, standing alone rendered the statement involuntary for due process purposes. They did rule however, that this element, viewed in a "totality of the circumstances", rendered this interview inadmissible. The Fifth Amendment guarantees citizens the right to fundamental fairness in all dealings the government has with its people – the State, in conjunction with Agent Pontius, violated this right.

2. *Connelly v Colorado* is inappropriate case law and distinguishable over the present facts. This case presents the circumstance of a mentally ill individual – voluntarily approaching a uniformed officer and confessing to a murder. In this case, the Court specifically ruled that coercive police activity would be the predicate to finding this defendant's confession involuntary. Mental illness is not before this court. Seeking out a uniformed police officer is not before this court. An apparent connection of the Agent to the criminal process does not exist and is not in front of this court. Dissenters in the above cited ruling warned that this precedent could be viewed as abandoning two hundred years of jurisprudence and weighed concern over how this ruling would be applied.

3. The Petitioners have presented no evidence that this is a recurring constitutional question, in fact, the specifics of this case are so isolated and narrow – the Respondent

spent literally hundreds of hours searching for federal, state even local case law with little result. The Court clearly ruled that in weighing all of the factors a fundamental unfairness to the respondent did exist in the actions of the Agent working in conjunction with the State of Kansas. Further, this case was and continues to be a case not of intentional wrongdoing - but an administrative mistake exploited for political gain. The County Attorney through her own police investigation (video taped and audio recorded), could identify no wrong doing and announced publicly that the investigation had no grounds for prosecution. Months later - due to harassment by a small political group - she sought the assistance of Agent Pontius in garnering additional information for the purpose of reinstating the investigation.

Agent Pontius acted in a "wholly inappropriate" manner in the pretense of an administrative interview when he clearly was conducting a criminal investigation for the benefit of the County Attorney. His intentional misrepresentation presents a situation where there is no "official record" of the conversation that transpired that day. There is no reliable evidence that a confession even occurred. The conduct of the justice system in this case is inexcusable, certainly is suspect to prosecutorial misconduct and was correctly rejected by the Kansas Supreme Court.

The case was moved and ordered dismissed by the State following the Supreme Court ruling. It was then days prior to the issuance of the mandate that the order was rescinded and the Solicitor General stepped in. It is difficult to discern that this type of activity is rampant throughout the land. Even more absurd is the fact that the Petitioner's believe

that the lowest level felony crime in the State of Kansas - punishable by, in this case, at most probation involves a constitutionally significant precedent, and embodies imperative public importance enough to warrant the attention of the highest Court in the land.

CONCLUSION

The Petitioners have presented no compelling reason for this Court to review this case; accordingly, the Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Certificate of Mailing

On this 28th Day of October, 2008 I forward a true and complete copy of the Brief in Opposition to the Petition for Certiorari to the United State Supreme Court case number 08-402 by United States Postal Service Priority Mail to:

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